

**IN THE SUPREME COURT
STATE OF MISSOURI**

IN RE:

Tommie A. Harsley, III

Respondent.

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Supreme Court #SC94909

INFORMANT'S BRIEF

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STATEMENT OF JURISDICTION

Jurisdiction over attorney discipline matters is established by Article 5, Section 5 of the Missouri Constitution, Supreme Court Rule 5, this Court's common law, and Section 484.040, R.S.Mo. (2000).

STATEMENT OF FACTS

PROCEDURAL HISTORY & KEY DATES

October 29, 2014	Information
November 24, 2014	Respondent's Answer to Information
December 8, 2014	Appointment of Disciplinary Hearing Panel
December 22, 2014	Notice of DHP Hearing (Hearing Date: February 20, 2015)
February 19, 2015	Informant's Amended Information Filed with the AC
February 19, 2015	Joint Stipulation of Facts, Joint Proposed Conclusions of Law and Joint Recommendation for Discipline filed with the AC
February 20, 2015	DHP Hearing
March 4, 2015	DHP Decision adopting Joint Stipulation of Facts, Joint Proposed Conclusions of Law and Joint Recommendation for Discipline filed with the AC
March 9, 2015	Acceptance of DHP decision by Informant filed with the AC
March 12, 2015	Acceptance of DHP decision by Respondent filed with the AC
April 6, 2015	Statement of Acceptance of DHP Decision filed with the AC
May 28, 2015	Record submitted

Background

Respondent Tommie Harsley, III, was licensed as an attorney in Missouri in 1987.

App. Vol. 2, A340.¹ Respondent has no prior disciplinary history. **Id.**

At all times relevant herein, Respondent maintained and used an attorney trust account with Bank of America, Account No. XXXX-XXXX-7698, in the account name of Attorney Tommie A. Harsley, III, Client Trust Account (“Trust Account”). **App. Vol. 2, A340-A341.** On July 12, 2013 and March 10, 2014, Bank of America, in compliance with the regulatory requirement set forth in amended Missouri Supreme Court Rule 4-1.15 and the related Advisory Committee Regulation effective January 1, 2010, sent an overdraft notification to the Office of Chief Disciplinary Counsel (“OCDC”) in relation to the Trust Account. **App. Vol. 2, A341.**

Respondent did not maintain complete Trust Account records that expressly reflected the date, amount, source, and explanation for all withdrawals and disbursements of the funds or other property of clients or other parties. **Id.** Therefore, OCDC subsequently obtained Respondent’s Trust Account bank statements and records from Bank of America via subpoena (for statements and records not otherwise provided by Respondent) in order to perform an audit of Respondent’s Trust Account. **App. Vol. 1, A6, A26; App. Vol. 2, A341.** The records obtained by OCDC from Bank of America relating to the Trust Account for the audit period of August 1, 2012 through April 30, 2014

¹ Citations to the record are denoted by the appropriate Appendix Volume and page reference, for example “**App. Vol. __, A__**”.

(“Bank of America Records”) reflect numerous instances of Respondent’s mishandling of his Trust Account. Respondent commingled personal funds with Trust Account funds by depositing in the Trust Account cash or earned legal fees and monies received for reimbursement of expenses advanced on behalf of the clients. **App. Vol. 2, A341.** In particular, on or about April 26, 2013, Respondent received a check from the insurance carrier in the amount of \$22,235.26 payable to Respondent only for Respondent’s earned legal fees in relation to his representation of client ER and reimbursement for expenses advanced on behalf of ER. **Id.** On May 1, 2013, Respondent made a split deposit of the insurance check into his personal account and Trust Account. **Id.** Respondent deposited the \$22,235.26 check into his personal bank account and designated \$13,235.26 of those funds for deposit into Respondent’s Trust Account that same day even though the advanced expenses already had been paid by Respondent. **App. Vol. 2, A341-A342.**

Respondent’s Bank of America Trust Account Records reflect further instances of Respondent commingling personal funds with Trust Account funds by leaving earned legal fees in the Trust Account, disbursing such fees on an as needed basis and maintaining insufficient records necessary to protect client funds, to wit:

- a. On August 1, 2012, Respondent deposited into the Trust Account two checks from the insurance company totaling \$9,605.00 representing settlement proceeds from his representation of clients SD and NR. Respondent thereafter failed to disburse his earned fees from the Trust Account in a timely manner and failed to maintain sufficient records necessary to protect client funds. **App. Vol. 2, A342.**

b. On October 19, 2012, Respondent deposited into the Trust Account a check from the insurance company in the amount of \$9,000.00 representing settlement proceeds from his representation of client VW. Respondent thereafter failed to disburse his earned fees from the Trust Account in a timely manner and failed to maintain sufficient records necessary to protect client funds. **Id.**

c. On October 25, 2012, Respondent deposited into the Trust Account a check from the insurance company in the amount of \$3,771.60 representing settlement proceeds from his representation of client GG. Respondent thereafter failed to disburse his earned fees from the Trust Account in a timely manner and failed to maintain sufficient records necessary to protect client funds. **Id.**

d. On November 29, 2012, Respondent deposited into the Trust Account a check from the insurance company in the amount of \$2,200.00 representing settlement proceeds from his representation of client BM. Respondent thereafter failed to disburse his earned fees from the Trust Account in a timely manner and failed to maintain sufficient records necessary to protect client funds. **App. Vol. 2, A343.**

e. On December 21, 2012, Respondent deposited a check into the Trust Account from the insurance company in the amount of \$11,250.00 representing settlement proceeds from his representation of client LS. Respondent thereafter failed to disburse his earned fees from the Trust Account in a timely manner and failed to maintain sufficient records necessary to protect client funds. **Id.**

f. On December 27, 2012, Respondent deposited \$4,400.00 into the Trust Account representing settlement proceeds from his representation of client GS. Respondent thereafter failed to disburse his earned fees from the Trust Account in a timely manner and failed to maintain sufficient records necessary to protect client funds. **Id.**

g. On January 4, 2013, Respondent deposited a check into the Trust Account from the insurance company in the amount of \$25,000.00 representing settlement proceeds from his representation of client DW. Respondent thereafter failed to disburse his earned fees from the Trust Account in a timely manner and failed to maintain sufficient records necessary to protect client funds. **Id.**

h. On January 17, 2013, Respondent deposited \$4,000.00 into the Trust Account representing settlement proceeds from his representation of client LM. Respondent thereafter failed to disburse his earned fees from the Trust Account in a timely manner and failed to maintain sufficient records necessary to protect client funds. **App. Vol. 2, A344.**

i. On February 6, 2013, Respondent deposited \$17,500.00 into the Trust Account representing settlement proceeds from his representation of client HC. Respondent thereafter failed to disburse his earned fees from the Trust Account in a timely manner and failed to maintain sufficient records necessary to protect client funds. **Id.**

j. On February 11, 2013, Respondent deposited \$7,733.34 into the Trust Account representing settlement proceeds from his representation of client RJ.

Respondent thereafter failed to disburse his earned fees from the Trust Account in a timely manner and failed to maintain sufficient records necessary to protect client funds. **Id.**

k. On July 31, 2013, Respondent deposited \$4,251.90 into the Trust Account representing settlement proceeds from his representation of client VJ. Respondent thereafter failed to disburse his earned fees from the Trust Account in a timely manner and failed to maintain sufficient records necessary to protect client funds. **Id.**

Respondent's Bank of America Trust Account Records also reflect that Respondent deposited clients' funds into the Trust Account and prior to disbursing to the clients their share of the settlement proceeds, the balance in the Trust Account fell below the amount of necessary client funds that should have been retained in the Trust Account. In particular:

a. On September 11, 2012, Respondent deposited \$663.56 into the Trust Account representing medical payments proceeds received from the insurance company for Respondent's minor client, CB. On July 10, 2013, the Trust Account fell to a negative balance. On January 10, 2014, Respondent remitted a check to TB, guardian for CB, in the amount of \$663.56 for the medical payments received from TB's insurance company. TB's medical payments check posted to Respondent's Trust Account on January 22, 2014. **App. Vol. 2, A344-A345.**

b. On February 11, 2013, Respondent deposited \$7,733.34 into the Trust Account representing settlement proceeds from his representation of client RJ. On July 10, 2013, Respondent's Trust Account fell to a negative balance. On July 23,

2013, Respondent remitted a check to client RJ representing RJ's share of the settlement proceeds. RJ's settlement check posted to Respondent's Trust Account on July 30, 2013. **App. Vol. 2, A345.**

The Bank of America Records further reflect that on numerous occasions Respondent deposited client funds into the account, retaining a portion of such funds to satisfy payment to third party providers on his client's behalf, and prior to making such payments the balance of the Trust Account fell below the amount of necessary client funds that should have been retained in the Trust Account. In particular:

a. On December 2, 2011, Respondent deposited \$10,100.00 into the Trust Account representing settlement proceeds from his representation of client DJ. Respondent disbursed a portion of those funds retaining \$663.81 of the settlement proceeds in the Trust Account for payment to Missouri Healthnet on DJ's behalf. On July 10, 2013, the balance of the Trust Account fell to a negative balance. On December 10, 2013, Respondent remitted payment to Missouri Healthnet on DJ's behalf. The check to Missouri Healthnet posted to the Trust Account on January 6, 2014. **App. Vol. 2, A345-A346.**

b. On December 21, 2012, Respondent deposited \$11,250.00 into the Trust Account representing settlement proceeds from his representation of client LS. Respondent disbursed a portion of the settlement proceeds from the Trust Account retaining \$400.00 in the Trust Account for an estimated Medicare reimbursement. On July 10, 2013, the balance of the Trust Account fell to a negative balance. On January 10, 2014, Respondent disbursed the funds for the Medicare

reimbursement to client LS. LS's Medicare reimbursement check posted to the Trust Account on January 13, 2014. **App. Vol. 2, A346.**

c. On January 17, 2013, Respondent deposited \$4,000.00 into the Trust Account representing settlement proceeds from his representation of client LM. Respondent disbursed LM's settlement proceeds from the Trust Account but retained \$1,180.00 in the Trust Account for payment of monies due LM's chiropractor. On July 10, 2013, the balance of the Trust Account fell to a negative balance. On August 28, 2013, Respondent remitted payment to the chiropractor. The chiropractor's check posted to the Trust Account on October 10, 2013. **Id.**

d. On February 6, 2013, Respondent deposited \$17,500.00 into the Trust Account representing settlement proceeds from his representation of client HC. Respondent disbursed HC's settlement proceeds from the Trust Account but retained \$1,400.00 in the Trust Account for payment of monies due HC's healthcare provider, Wilmington Clinic. On July 10, 2013, the balance of the Trust Account fell to a negative balance. On August 6, 2013, Respondent remitted payment to the clinic. The clinic's check posted to the Trust Account on August 12, 2013. **App. Vol. 2, A347.**

e. On July 12, 2013, Respondent deposited \$26,000.00 into the Trust Account representing settlement proceeds from his representation of client CG. Respondent disbursed CG's settlement proceeds from the Trust Account but retained \$14,823.95 of the settlement proceeds in the Trust Account for payment of a subrogation lien asserted against the proceeds by the Missouri Department of

Social Services. The balance of the Trust Account on July 26, 2013, fell to \$14,639.74, leaving insufficient funds in the Trust Account to satisfy the payment to the Missouri Department of Social Services. On August 20, 2013, Respondent remitted payment to the Missouri Department of Social Services for the subrogation lien. The check to the Missouri Department of Social Services posted to Respondent's Trust Account on November 29, 2013. **Id.**

f. On August 1, 2013, Respondent deposited \$63,558.50 into the Trust Account representing settlement proceeds from his representation of client OP. Respondent disbursed a portion of the proceeds but retained \$22,485.51 of OP's settlement proceeds in the Trust Account for monies due the Family Support Payment Center on OP's behalf. The balance of the Trust Account on September 10, 2013, fell to \$22,350.12, leaving insufficient funds in the Trust Account to satisfy the payment to the Family Support Payment Center. On December 30, 2013, Respondent remitted payment to the Family Support Payment Center. The check to the Family Support Center posted to Respondent's Trust Account on February 18, 2014. **App. Vol. 2, A347-A348.**

g. On October 30, 2013, Respondent deposited \$6,000.00 into the Trust Account representing settlement proceeds from his representation of client CH. Respondent disbursed a portion of CH's proceeds but retained \$2,000.00 of the settlement proceeds in the Trust Account for payment to Steen Chiropractic. On January 17, 2014, Respondent remitted payment to Steen Chiropractic. On March 5, 2014, the balance of the Trust Account fell to a negative balance. The check to

Steen Chiropractic posted to Respondent's Trust Account on March 18, 2014. **App. Vol. 2, A348.**

h. On November 22, 2013, Respondent deposited \$6,000.00 into the Trust Account representing settlement proceeds from his representation of client DP. Respondent disbursed a portion of DP's proceeds but retained \$110.00 of the settlement proceeds in the Trust Account for payment to Med-Care RX. On March 5, 2014, the balance of the Trust Account fell to a negative balance. On March 27, 2014, Respondent remitted payment to Med-Care RX. The Med-Care RX check posted to Respondent's Trust Account on April 1, 2014. **Id.**

i. On December 2, 2013, Respondent deposited \$10,000.00 into the Trust Account representing settlement proceeds from his representation of client SR. Respondent disbursed the settlement funds to SR and SR's healthcare providers, including St. Mary's Hospital. On March 5, 2014, the balance of the Trust Account fell to a negative balance. On March 19, 2014, St. Mary's Hospital check in the amount of \$2,566.00 posted to Respondent's Trust Account. **App. Vol. 2, A349.**

j. On December 18, 2013, Respondent deposited \$15,000.00 into the Trust Account representing settlement proceeds from his representation of client AG. Respondent disbursed a portion of those funds retaining in the Trust Account \$3,100.00 of the settlement proceeds for payment of an outstanding medical bill to St. Joseph Health Center. On March 5, 2014, the balance of the Trust Account fell to a negative balance. On March 25, 2014, Respondent remitted payment to St.

Joseph Health Center. The payment to St. Joseph Health Center posted to Respondent's Trust Account on April 7, 2014. **Id.**

k. On January 2, 2014, Respondent deposited \$3,500.00 into the Trust Account representing settlement proceeds from his representation of client IC. Respondent disbursed a portion of those funds retaining in the Trust Account \$1,250.00 of the settlement proceeds for payment of an outstanding medical bill to William Straughn. On March 5, 2014, the balance of the Trust Account fell to a negative balance. On March 28, 2014, Respondent remitted payment to William Straughn. The payment to William Straughn posted to Respondent's Trust Account on March 31, 2014. **Id.**

l. On January 21, 2014, Respondent deposited \$9,000.00 into the Trust Account representing settlement proceeds from his representation of client RJ. Respondent disbursed a portion of those funds retaining \$2,500.00 of the settlement proceeds in the Trust Account for payment to Esquire Sports Medicine. On March 5, 2014, the balance of the Trust Account fell to a negative balance. On March 25, 2014, Respondent remitted payment to Esquire Sports Medicine. The payment to Esquire Sports Medicine posted to Respondent's Trust Account on April 2, 2014. **App. Vol. 2, A350.**

m. On January 22, 2014, Respondent deposited \$19,000.00 into the Trust Account representing settlement proceeds from his representation of client MH. Respondent disbursed a portion of those funds retaining \$5,000.00 of the settlement proceeds in the Trust Account for payment to Citrin Chiropractic. On March 5,

2014, the balance of the Trust Account fell to a negative balance. On March 21, 2014, Respondent remitted payment to Citrin Chiropractic. The payment to Citrin Chiropractic posted to Respondent's Trust Account on March 24, 2014. **Id.**

n. On January 30, 2014, Respondent deposited \$8,500.00 into the Trust Account representing settlement proceeds from his representation of client CW. Respondent disbursed a portion of the settlement proceeds retaining \$537.80 of the settlement proceeds in the Trust Account for payment to SSM Health Center. On March 5, 2014, the balance of the Trust Account fell to a negative balance. On March 28, 2014, Respondent remitted payment to SSM Health Center. The SSM Health Center check posted to Respondent's Trust Account on April 4, 2014. **App. Vol. 2, A350-A351.**

o. On February 4, 2014, Respondent deposited \$11,300.00 into the Trust Account representing settlement proceeds from his representation of client HT. Respondent disbursed a portion of the settlement proceeds retaining \$1,611.58 of the settlement proceeds in the Trust Account for payment to SSM Health Center. On March 5, 2014, the balance of the Trust Account fell to a negative balance. On March 28, 2014, Respondent remitted payment to SSM Health Center in the amount of \$1,611.68. The SSM Health Center check posted to Respondent's Trust Account on April 4, 2014. **App. Vol. 2, A351.**

The Bank of America Records also reflect that on numerous occasions, prior to the deposit of any monies into the Trust Account on the client's behalf, Respondent advanced

payments from the Trust Account to the client or to third parties on the client's behalf. In particular:

a. On November 26, 2012, Respondent remitted a check to client PJ in the amount of \$350.00, drawn upon the Trust Account. No funds had posted to Respondent's Trust Account on behalf of client PJ prior to presentment of the \$350.00 check for payment on November 27, 2012. **App. Vol. 2, A351.**

b. On October 17, 2012, Respondent remitted a check to client GG in the amount of \$600.00 drawn on the Trust Account. On October 25, 2012, Respondent deposited \$3,771.60 into the Trust Account representing settlement proceeds from his representation of client GG. Prior to October 25, 2012, Respondent had not deposited any funds into the Trust Account on behalf of GG. **App. Vol. 2, A351-A352.**

c. Between December 10, 2012 and December 24, 2012, Respondent remitted from the Trust Account three separate checks totaling \$490.00 payable to client GS. On December 27, 2012, Respondent deposited \$4,400.00 into the Trust Account representing settlement proceeds from his representation of client GS. Prior to December 27, 2012, Respondent had not deposited any funds into the Trust Account on behalf of GS. **App. Vol. 2, A352.**

d. On February 6, 2013, on behalf of client VJ, Respondent remitted a check drawn on the Trust Account in the amount of \$425.00 payable to Dr. Berkin for an Independent Medical Exam. On July 31, 2013, Respondent deposited \$4,251.90 into the Trust Account representing settlement proceeds from his

representation of client VJ. Prior to July 31, 2013, Respondent had not deposited any funds into the Trust Account on behalf of VJ. **Id.**

e. On December 3, 2013, Respondent issued client GM a check drawn on the Trust Account in the amount of \$1,306.00. The check was post-dated for December 6, 2013. On December 3, 2013, the \$1,306.00 check was presented for payment and honored. On December 4, 2013, Respondent deposited \$1,306.00 into the Trust Account representing settlement proceeds from his representation of client GM. Respondent had not deposited any funds into the Trust Account on behalf of GM prior to the December 4, 2013, deposit of GM's settlement proceeds. **Id.**

f. On December 18, 2013, Respondent remitted a check drawn on the Trust Account in the amount of \$750.00 to VF, guardian of the minor client SC. The check was for repayment of costs incurred by VF during the litigation of SC's injury claim. The check was presented for payment and honored on December 18, 2013. At no time had Respondent deposited any funds into the Trust Account on behalf of SC or VF. **App. Vol. 2, A353.**

g. Respondent remitted the payments set forth below on behalf of client EM for a pending wrongful death matter. Each payment was drawn on Respondent's Trust Account prior to the deposit of any funds into the Trust Account on behalf of EM for settlement or costs. In particular:

(i) A check in the amount of \$552.00 paid to Ross Dixon on September 24, 2012. **Id.**

(ii) A check in the amount of \$1,020.00 for expert witness fees paid to Robert Slack on August 28, 2013. **Id.**

(iii) A check in the amount of \$165.60 paid to Cotton Investigations, Inc. on November 14, 2013. **Id.**

(iv) A check in the amount of \$550.00 paid to Lane Hudgins Analysis on January 21, 2014. **Id.**

h. On September 19, 2013, on behalf of his minor client AM, Respondent remitted a check drawn on Respondent's Trust Account in the amount of \$800.00 to USA&M for mediation costs. At no time prior to September 19, 2013 had Respondent deposited any funds into the Trust Account on behalf of his minor client AM. **App. Vol. 2, A353-A354.**

The Bank of America Trust Account records further reflect that Respondent paid personal or operating expenses out of the Trust Account. Such payments were made via ACH withdrawals, or by writing checks directly to payees, including Respondent's wife, Respondent's employee, Pulaski Bank, American Express, GE Capital, Cardmember Services, Cardmember Pay, Chase, and Bank of America. **App. Vol. 2, A354.**

The Bank of America Trust Account Records further reflect that Respondent's Trust Account was treated as a regular business checking account thereby incurring significant monthly service charges. **App. Vol. 1, A65-A66, A105.** Prior to the audit, Respondent was unaware of the service charges as Respondent did not reconcile his Trust Account on a monthly basis. **App. Vol. 1, A100; App. Vol. 2, A354.** Respondent's normal course of practice prior to 2013 consisted of a quarterly reconciliation of his Trust Account. **App.**

Vol. 1, A100. By 2013, Respondent was no longer performing a quarterly reconciliation of his Trust Account and “wasn’t really thinking about it”. **Id.** Respondent said that he had less incentive to reconcile his Trust Account once he realized that the Trust Account balance “wasn’t right”. **Id.**

As a result of the audit, Respondent realized that the Trust Account was charged monthly bank service charges ranging between \$30.00 and \$90.00. **App. Vol. 1, A106.** Respondent roughly estimated service charges charged by Bank of America in the amount of \$10,000.00 for the preceding twenty year period. **Id.**

Disciplinary Hearing Panel and Decision

The Disciplinary Hearing was held on February 20, 2015. **App. Vol. 1, A36-A127.** Just prior to the commencement of the Disciplinary Hearing, Informant and Respondent entered into a Joint Stipulation of Facts, Joint Conclusions of Law, and Joint Sanction Recommendation to submit to the Disciplinary Hearing Panel. **App. Vol. 2, A347-A367.** On March 3, 2015, the Disciplinary Hearing Panel accepted the Joint Stipulation of Facts, Joint Proposed Conclusions of Law and Joint Recommendation for Discipline submitted to it by the parties, which found that:

- Respondent violated Rule 4-1.3 by failing to act with reasonable promptness in delivering the funds of client to clients or third parties. **App. Vol. 2, A430.**

- Respondent violated Rule 4-1.15 (a)² by commingling personal and client funds in his Trust Account and by failing to appropriately safeguard his client's property.

Id.

- Respondent violated Rule 4-1.15 (f)³ by failing to keep complete records of the Trust Account that expressly reflect the date, amount, source, and explanation for **all** withdrawals and disbursements of the funds or other property of clients or other parties. **App. Vol. 2, A431.**
- Respondent violated Rule 4-1.15(a)(7) by failing to perform a reconciliation of the account reasonably promptly each time an official statement from the financial institution is provided or available. **Id.**
- Respondent violated Rule 4-1.15(b)⁴ by depositing his own funds into the Trust Account in an amount greater than necessary to cover bank service charges. **Id.**

² The applicable subsection of Rule 4-1.15 when Respondent engaged in the misconduct at issue prior to July 1, 2013 appeared as Rule 4-1.15(c). All further references herein shall be to the current version of the rule, Rule 4-1.15 (a), effective July 1, 2013.

³ The applicable subsection of Rule 4-1.15 when Respondent engaged in the misconduct at issue prior to July 1, 2013 appeared as Rule 4-1.15(d). All further references herein shall be to the current version of the rule, Rule 4-1.15(f), effective July 1, 2013.

⁴ The applicable subsection of Rule 4-1.15 when Respondent engaged in the misconduct at issue prior to July 1, 2013 appeared as Rule 4-1.15(e). All further references herein shall be to the current version of the rule, Rule 4-1.15(b), effective July 1, 2013.

- Respondent violated 4-1.15 (d)⁵ by failing to promptly deliver funds to clients and third parties. **Id.**

The Panel found the following as aggravating factors:

a. Respondent engaged in a pattern of commingling client funds with personal funds and committed multiple offenses by commingling funds, failing to deliver the funds of clients to clients or third parties with reasonable promptness, and failing to keep complete records of the Trust Account. **App. Vol. 2, A432.**

b. Respondent has significant experience in the practice of law. **Id.**

The Panel found the following as mitigating factors:

a. Respondent has no prior disciplinary record as a lawyer, exhibited no dishonest or selfish motive in his misconduct and was cooperative with the disciplinary proceedings. **Id.**

b. Respondent made no effort to delay the disciplinary proceedings or obstruct the investigation. **Id.**

Based on the foregoing findings and conclusions, the Panel concurred with the Joint Stipulation and recommended as the DHP Decision that Respondent's license be suspended indefinitely with no leave to apply for reinstatement for twelve (12) months, with such suspension to be stayed during a twenty-four (24) month probationary period. **Id.**

⁵ The applicable subsection of Rule 4-1.15 when Respondent engaged in the misconduct at issue prior to July 1, 2013 appeared as Rule 4-1.15(i). All further references herein shall be to the current version of the rule, Rule 4-1.15(d), effective July 1, 2013.

Informant accepted the DHP Decision by letter dated March 9, 2015. **App. Vol. 2, A444.** Respondent accepted the DHP Decision by letter dated March 12, 2015. **App. Vol. 2, A445.** The Statement of Acceptance of the DHP Decision was filed with the Supreme Court on April 6, 2015. **App. Vol. 2, A446-A528.** By Order dated April 28, 2015, this Court ordered Informant and Respondent to file briefs in this matter. **App. Vol. 2, A529.** Informant filed the record in this matter with the Court on May 28, 2015.

POINTS RELIED ON

I.

RESPONDENT VIOLATED THE RULES OF PROFESSIONAL CONDUCT BY:

(A) FAILING TO ACT WITH REASONABLE PROMPTNESS IN DELIVERING THE FUNDS OF CLIENTS TO CLIENTS OR THIRD PARTIES, IN VIOLATION OF RULES 4-1.3 AND 4-1.15(d).

(B) FAILING TO APPROPRIATELY SAFEGUARD CLIENTS' PROPERTY PURSUANT TO RULE 4-1.15 BY:

1. COMMINGLING PERSONAL FUNDS AND CLIENT FUNDS IN THE TRUST ACCOUNT WHEN RESPONDENT DEPOSITED CASH OR EARNED FEES INTO HIS TRUST ACCOUNT AND WHEN RESPONDENT FAILED TO WITHDRAW EARNED FEES FROM HIS TRUST ACCOUNT, IN VIOLATION OF RULES 4-1.15(a) AND 4-1.15(b);

2. FAILING TO KEEP COMPLETE RECORDS OF THE TRUST ACCOUNT THAT EXPRESSLY REFLECT THE DATE, AMOUNT, SOURCES AND EXPLANATION FOR ALL WITHDRAWALS AND DISBURSEMENTS OF THE FUNDS OR OTHER PROPERTY OF CLIENTS OR OTHER PARTIES IN VIOLATION OF RULE 4-1.15(f);

3. FAILING TO PERFORM A RECONCILIATION OF THE ACCOUNT REASONABLY PROMPTLY EACH TIME AN

**OFFICIAL STATEMENT FROM THE FINANCIAL INSTITUTION
IS PROVIDED OR AVAILABLE, IN VIOLATION OF RULE 4-
1.15(a)(7); AND,**

**4. USING THE TRUST ACCOUNT TO PAY PERSONAL
EXPENSES IN VIOLATION OF RULE 4-1.15(a).**

ABA Standards for Imposing Lawyer Sanctions (1991 ed.)

In re Bizar, 97 Ill. 2d 127, 454 N.E. 2d 271 (1983)

In re Coleman, 295 S.W.3d 857 (Mo. banc 2009)

In re Witte, 615 S.W.2d 421 (Mo. banc 1981)

Rule 4-1.3, Rules of Professional Conduct

Rule 4-1.15, Rules of Professional Conduct

POINT RELIED ON

II.

THE ABA STANDARDS FOR IMPOSING LAWYER SANCTIONS AND PRIOR CASE LAW SUGGEST THAT AFTER CONSIDERATION OF RESPONDENT’S MITIGATING FACTORS IN THIS CASE, INCLUDING RESPONDENT’S LACK OF DISCIPLINARY HISTORY AND NO EVIDENCE THAT RESPONDENT’S CONDUCT CAUSED INJURY, AND THE REMEDIAL MEASURES TAKEN BY RESPONDENT TO CORRECT HIS MISCONDUCT, PROBATION IS THE APPROPRIATE SANCTION IN THIS CASE WHERE RESPONDENT’S FAILURE TO SAFEGUARD CLIENT PROPERTY (IN VIOLATION OF RULE 4-1.15) AND FAILURE TO PROMPTLY REMIT PAYMENT TO CLIENTS OR THIRD PARTIES (IN VIOLATION OF RULES 4-1.15 AND 4-1.3) WAS NOT INTENTIONAL, THAT SUCH MISCONDUCT CAN BE CORRECTED AND RESPONDENT’S RIGHT TO PRACTICE LAW NEEDS TO BE MONITORED RATHER THAN REVOKED.

ABA Standards for Imposing Lawyer Sanctions (1991 ed.)

In re Coleman, 295 S.W.3d 857 (Mo. banc 2009)

In re Ehler, 319 S.W.3d 442 (Mo. banc 2010)

In re Kazanas, 96 S.W.3d 803 (Mo. banc 2003)

In re Wiles, 107 S.W.3d 228 (Mo. banc 2003)

ARGUMENT

I.

RESPONDENT VIOLATED THE RULES OF PROFESSIONAL CONDUCT BY:

(A) FAILING TO ACT WITH REASONABLE PROMPTNESS IN DELIVERING THE FUNDS OF CLIENTS TO CLIENTS OR THIRD PARTIES, IN VIOLATION OF RULES 4-1.3 AND 4-1.15(d).

(B) FAILING TO APPROPRIATELY SAFEGUARD CLIENTS' PROPERTY PURSUANT TO RULE 4-1.15 BY:

1. COMMINGLING PERSONAL FUNDS AND CLIENT FUNDS IN THE TRUST ACCOUNT WHEN RESPONDENT DEPOSITED CASH OR EARNED FEES INTO HIS TRUST ACCOUNT AND WHEN RESPONDENT FAILED TO WITHDRAW EARNED FEES FROM HIS TRUST ACCOUNT, IN VIOLATION OF RULES 4-1.15(a) AND 4-1.15(b);

2. FAILING TO KEEP COMPLETE RECORDS OF THE TRUST ACCOUNT THAT EXPRESSLY REFLECT THE DATE, AMOUNT, SOURCES AND EXPLANATION FOR ALL WITHDRAWALS AND DISBURSEMENTS OF THE FUNDS OR OTHER PROPERTY OF CLIENTS OR OTHER PARTIES IN VIOLATION OF RULE 4-1.15(f);

3. FAILING TO PERFORM A RECONCILIATION OF THE ACCOUNT REASONABLY PROMPTLY EACH TIME AN

**OFFICIAL STATEMENT FROM THE FINANCIAL INSTITUTION
IS PROVIDED OR AVAILABLE, IN VIOLATION OF RULE 4-
1.15(a)(7); AND,**

**4. USING THE TRUST ACCOUNT TO PAY PERSONAL
EXPENSES IN VIOLATION OF RULE 4-1.15(a).**

A. *Respondent's Violation of Rules 4-1.3 and 4-1.15(d).*

Rules 4-1.3 and 4-1.15(d) govern the importance of a lawyer's attentiveness and celerity in representing clients. Rule 4-1.3 provides that "[a] lawyer shall act with reasonable diligence and promptness in representing a client." Rule 4-1.3. Rule 4-1.15(d) provides in pertinent part, that "[u]pon receiving funds or other property in which a client or third person has an interest, a lawyer shall promptly notify the client or third person." Rule 4-1.15(d). Thereafter, the lawyer shall "promptly deliver to the client or third person any funds or other property that the client or third person is entitled to receive" Rule 4-1.15(d). Here, Respondent acknowledges that he failed to timely remit payment to clients and/or third parties to whom payment was due (on behalf of his clients) in violation of Rules 4-1.3 and 4-1.15(d). **App. Vol. 2, A354-A355.**

Delivery of Client Funds to Clients

Respondent admits that he failed to timely deliver client funds to clients CB and RJ after settlement of the clients' personal injury matters. **App. Vol. 2, A354-A355.** Respondent deposited client CB's medical payments funds into the Trust Account on September 11, 2012. **App. Vol. 1, A205-A212; App. Vol. 2, A345.** Respondent, however, did not remit to CB's guardian, the medical payments check due CB until January 10, 2014, more than fifteen (15) months after the funds were deposited into the Trust Account. **Id.** Respondent deposited client RJ's settlement proceeds into the Trust Account on February 11, 2013. **App. Vol. 1, A213-A218; App. Vol. 2, A345.** But, Respondent did not remit to RJ his share of the settlement proceeds until July 23, 2013, more than five (5) months after the deposit into the Trust Account. **Id.**

Further, the balance of the Trust Account fell below the amount of necessary client funds that should have been retained in the Trust Account on behalf of clients CB and RJ prior to Respondent's disbursements to the clients. Specifically, the Trust Account balance fell to a negative balance on July 10, 2013, prior to Respondent's remittance of payments to CB's guardian and to RJ on January 10, 2014 and July 23, 2013, respectively. **App. Vol. 1, A205-A212; App. Vol. 1, A213-A218; App. Vol. 2, A345.**

Delivery of Client Funds to Third Parties

Respondent also acknowledges that he failed to timely remit payment of client funds to third parties to whom payment was due after settlement of clients' personal injury matters. **App. Vol. 2, A354-A355.** Respondent stipulated to the following client

settlement proceeds deposit dates into his Trust Account and the check remittance date or disbursement date for payments due third parties:

1. Client DJ's settlement proceeds deposited into the Trust Account on December 2, 2011. Third party Missouri Healthnet check remitted on behalf of DJ on December 10, 2013. **App. Vol. 1, A219-A204; App. Vol. 2, App. A345-A346.**
2. Client LS's settlement proceeds deposited into the Trust Account on December 21, 2012. Third party Medicare check remitted on behalf of LS on January 10, 2014. **App. Vol. 1, A225-A231; App. Vol. 2, A346.**
3. Client LM's settlement proceeds deposited into the Trust Account on January 17, 2013. Third party chiropractor check remitted on behalf of LM on August 28, 2013. **App. Vol. 1, A232-A237; App. Vol. 2, A346.**
4. Client HC's settlement proceeds deposited into the Trust Account on February 6, 2013. Third party Wilmington Clinic check remitted on behalf of HC on August 6, 2013. **App. Vol. 1, A238-A244; App. Vol. 2, A346.**
5. Client CG settlement proceeds deposited into the Trust Account on July 12, 2013. Third party Missouri Department of Social Services check remitted on behalf of CG on August 20, 2013. **App. Vol. 1, A245-A250; App. Vol. 2, A347.**
6. Client OP settlement proceeds deposited into the Trust Account on August 1, 2013. Third party Family Support Payment Center check remitted on behalf of OP on December 30, 2013. **App. Vol. 1, A251-A258; App. Vol. 2, A347-A348.**
7. Client CH settlement proceeds deposited into the Trust Account on October 30, 2013. Third party Steen Chiropractic check remitted on behalf of CH and posted

to Respondent's Trust Account on March 18, 2014. **App. Vol. 1, A259-A264; App. Vol. 2, A348.**

8. Client DP settlement proceeds deposited into the Trust Account on November 22, 2013. Third party Med-Care RX check remitted on behalf of DP on March 27, 2014. **App. Vol. 1, A265-A270; App. Vol. 2, A348.**

9. Client SR settlement proceeds deposited into the Trust Account on December 2, 2013. Third party St. Mary's check remitted on behalf of SR posted to Respondent's Trust Account on March 19, 2014. **App. Vol. 2, A273-A279, A349.**

10. Client AG settlement proceeds deposited into the Trust Account on December 18, 2013. Third party St. Joseph Health Center's check remitted on behalf of AG on March 25, 2014. **App. Vol. 2, A280-A287, A349.**

11. Client IC settlement proceeds deposited into the Trust Account on January 2, 2014. Third party William Straughn check remitted on behalf of IC on March 28, 2014. **App. Vol. 2, A288-A293, A349.**

12. Client RJ settlement proceeds deposited into the Trust Account on January 21, 2014. Third party Esquire Sports Medicine check remitted on behalf of RJ on March 25, 2014. **App. Vol. 2, A294-A298, A350.**

13. Client MH settlement proceeds deposited into the Trust Account on January 22, 2014. Third party Citrin Chiropractic check remitted on behalf of MH on March 21, 2014. **App. Vol. 2, A299-A306, A350.**

14. Client CW settlement proceeds deposited into the Trust Account on January 30, 2014. Third party SSM Health Center check remitted on behalf of CW on March 28, 2014. **App. Vol. 2, A307-A312, A350-A351.**

15. Client HT settlement proceeds deposited into the Trust Account on February 4, 2014. Third party SSM Health Center check remitted on behalf of HT on March 28, 2014. **App. Vol. 2, A313-A320, A351.**

The facts are undisputed that Respondent failed to timely deliver funds owed to Respondent's clients or to third parties on behalf of his clients. **App. Vol. 1, A102, A219-A270; App. Vol. 2, A271-A320.** Although OCDC received no complaints from Respondent's clients or the third parties referenced above, some of Respondent's clients and their third party providers (to whom funds were owed on behalf of clients) were forced to wait more than a year for proceeds due them. **App. Vol. 1, A89-A90, A219-A270; App. Vol. 2, A271-A320.** The untimely delivery of funds shows Respondent's lack of diligence and arises to violations of Rules 4-1.3 and 4-1.15(d).

The public "expects lawyers to exhibit the highest standards of honesty and integrity." ABA *Standards for Imposing Lawyer Sanctions* (1991 ed.)(referred to hereinafter as, "ABA *Standards*"), pg. 5. "Unreasonable delay can cause a client needless anxiety and undermine confidence in the lawyer's trustworthiness." Rule 4-1.3, Comment 3.

B. Respondent Failed to Appropriately Safeguard his Client's Property, in Violation of Rule 4-1.15(a) and Rule 4-1.15(b) by Commingling Personal and Client Funds and Failing to Maintain Complete Trust Account Records.

1. Respondent commingled personal funds and client funds in the Trust Account by failing to promptly remove earned legal fees from the Trust Account and by depositing cash or earned legal fees into his Trust Account.

Missouri Supreme Court Rules 4-1.15(a) and (b) (effective July 1, 2013) provide, in relevant part, that:

(a) A lawyer shall hold property of clients or third persons that is in a lawyer's possession in connection with a representation separate from the lawyer's own property. Client or third party funds shall be kept in a separate account designated as a "Client Trust Account" or words of similar import maintained in the state where the lawyer's office is situated or elsewhere if the client or third person consents. Rule 4-1.15(a).

(b) A lawyer may deposit the lawyer's own funds in a client trust account for the sole purpose of paying bank service charges on that account, but only in an amount necessary for that purpose. Rule 4-1.15(b).

This Court explained the rationale of the probation against commingling in *In re Witte*, 615 S.W.2d 421, 422 (Mo. banc 1981). In *In re Witte*, this Court stated that underlying purpose of the rule against commingling is to provide against the probability in some cases, the possibility in many cases, and the danger in all cases that such commingling will result in the loss of clients' money. *Id.* In addition, Respondent's commingling of

client and personal funds potentially exposed those client funds to Respondent's own creditors' claims.

In this case, Respondent's Trust Account audit revealed several instances in which Respondent commingled personal funds and client trust funds in his Trust Account between August 1, 2012 and April 30, 2014. Specifically, Respondent admitted that it was his normal course of practice to leave earned fees in the Trust Account after settlement of a client's case and withdraw those fees, on as needed basis, in the form of disbursements to himself or in the form of payments from the Trust Account for personal or operating expenses. **App. Vol. 1, A95, A101; App. Vol. 2, A341-A344.** Even if Respondent's Trust Account had contained only Respondent's earned fees, Rule 4-1.15(a) explicitly provides that there must be an account for client and third party funds that is kept separate from any account holding an attorney's own funds. Rule 4-1.15(a).

Rule 4-1.15(b) permits commingling personal and client funds only when necessary to pay bank service charges. Rule 4-1.15(b), Rule 4-1.15, Comment 6. Rule 4-1.15(b) limits the amount of personal funds in the Trust Account to only that amount necessary for the payment of such charges. Rule 4-1.15(b). In this case, Respondent commingled personal funds with client funds by depositing in the Trust Account funds in excess of the amount permitted by Rule 4-1.15(b). **App. Vol. 1, A51; App. Vol. 2, A341-A342.** Respondent received a check from an insurance carrier on April 26, 2013, in the amount of \$22,235.26, payable to Respondent only for Respondent's earned legal fees in relation to his representation of client ER and reimbursement for expenses advanced on behalf of ER. **App. Vol. 2, A341-A342.** On May 1, 2013, Respondent deposited the \$22,235.26

check into his personal bank account and designated \$13,235.26 of those funds for deposit into Respondent's Trust Account that same day. **Id.** Respondent's deposit of \$13,235.26 in earned funds into his Trust Account far exceeded the permissible amount authorized by Rule 4-1.15(b).

2. *Respondent failed to maintain and preserve complete records of his Trust Account.*

To further to ensure that client funds are properly safeguarded, the Rules of Professional Conduct require a lawyer to maintain, on a current basis, books and records in accordance with generally accepted accounting practices and comply with any recordkeeping rules established by law or court order. Rule 4-1.15, Comment 1. Rule 4-1.15(f) imposes a duty upon the lawyer to maintain and preserve complete records of client trust accounts for a period of at least five years after termination of the representation or after the date of the last disbursement of funds, whichever is later. Rule 4-1.15(f). Rule 4-1.15(f) also sets forth a detailed listing of the minimal amount of records and documentation that should maintained by the lawyer. For example, a lawyer's records should include,

(1) [R]eceipt and disbursement journals containing a record of deposits to and withdrawals from client trust accounts, specifically identifying the date, source, and description of each item deposited as well as the date, payee, and purpose of each disbursement. Rule 4-1.15(f)(1).

Respondent admitted that he failed to keep records of the Trust Account that expressly reflect the date, amount, source, and explanation for all withdrawals and

disbursements of the funds or other property of client or other parties in violation of Rule 4-1.15(f). **App. Vol. 1, A95; App. Vol. 2, A341.** After settlement of a client’s personal injury matter, rather than “sweep” or remove his attorney’s from the Trust Account, Respondent routinely left his fees in the Trust Account and made disbursements to himself or paid personal or operating expenses from the Trust Account. **App. Vol. 1, A90-91, A95; App. Vol. 2, A342-A344, A354.** Respondent was unable to identify with certainty the source of his earned fees that remained in the Trust Account during the audit period. Respondent testified, “I just had a ballpark figure in my head where I was at.” **App. Vol. 1, A101.** “Accurate records must be kept regarding which part of the funds are the lawyer’s.” Rule 4-1.15, Comment 6.

Respondent’s failure to maintain accurate records required by Rule 4-1.15 resulted draws and disbursements against client funds that should have continued to be held in Respondent’s Trust Account. **App. Vol. 1, A50, A95, A101, App. Vol. 2, A341.** In fact, although all clients and third parties were ultimately paid by the conclusion of the Trust Account audit period, the audit revealed that Respondent’s Trust Account, on numerous occasions, fell below the balance of client funds that should have been held in the Trust Account. **App. Vol. 1, A66, A87-A89, A101; App. Vol. 2, A342-A344.** “It is the risk of the loss of funds while they are in the attorney’s possession, and not only their actual loss, which the rule is designed to eliminate....” *ABA Standards*, Commentary to Rule 4.12 (quoting *In re Bizar*, 97 Ill. 2d 127, 454 N.E. 2d 271 (1983)).

3. Respondent failed to perform a reconciliation of his Trust Account reasonably promptly each time an official statement from the financial institution was provided or available.

Rule 4-1.15(a)(7) provides that a reconciliation of the account shall be performed reasonably promptly each time an official statement from the financial institution is provided or becomes available. Rule 4-1.15(a)(7). Rule 4-1.15(a)(7), Comment 18, provides that:

The potential of these records to serve as safeguards is realized only if reconciliations are regularly performed. Reconciliation each time a statement is generated by the financial institution will enable the easiest identification of an error (whether by the lawyer or the bank). Rule 4-1.15, Comment 18.

Respondent failed to perform reasonably prompt reconciliations of his Trust Account. **App. Vol. 1, A100; App. Vol. 2, A354.** Respondent testified that at one point, he performed quarterly reconciliations of the Trust Account, and by 2013, he “wasn’t really thinking about it.” **App. Vol. 1, A100.** Respondent stated that he realized that the Trust Account balance “wasn’t right” and he therefore had less incentive to reconcile his Trust Account. **Id.** As a result of Respondent’s failure to perform reasonable reconciliations of his Trust Account, Respondent’s account was overdrawn twice and on numerous occasions the Trust Account balance fell below the balance necessary to hold client settlement funds in trust between August 1, 2012 and April 30, 2014. **App. Vol. 1, A90-91, A95; App. Vol. 2, A418-A421.**

Further, had Respondent reconciled his Trust Account reasonably promptly each time a statement was provided, Respondent would have likely noticed the significant amount of service charges being charged by Bank of America. **App. Vol. 1, A65-A66.** Bank of America was treating Respondent's Trust Account as a regular business checking account and erroneously charging astronomical service charges. **App. Vol. 1, A105.** Respondent testified that as a result of the audit, he realized that the Trust Account was charged monthly bank service charges ranging between \$30.00 and \$90.00. **App. Vol. 1, A106.** Respondent roughly estimated service charges charged by Bank of America in the amount of \$10,000.00 for the preceding twenty year period. **Id.** Respondent could have avoided such service charges to the Trust Account by performing regular reconciliations each time a monthly statement was provided by the bank.

4. *Respondent paid personal or operating expenses out of the Trust Account.*

Respondent made several payments from the Trust Account for personal or operating expenses. **App. Vol. 2, A430.** Such payments were made via ACH withdrawals, or by writing checks directly to payees, including Respondent's wife, Respondent's employee, Pulaski Bank, American Express, GE Capital, Cardmember Services, Cardmember Pay, Chase, and Bank of America. **Id.** Respondent testified that he believed that the funds used to pay his personal or operating expenses were his attorney fees left in the Trust Account from client settlements. **App. Vol. 1, A104.** Notwithstanding, Respondent's misconception, Respondent used the Trust Account for personal use. Such use of the Trust Account is strictly prohibited by Rule 4-1.15(a). *In re Larry Coleman*, 295

S.W.3d 859, 866 (Mo. banc 2009)(attorney's use of his IOLTA account for personal use is strictly prohibited by Rule 4-1.15).

ARGUMENT

II.

THE ABA STANDARDS FOR IMPOSING LAWYER SANCTIONS AND PRIOR CASE LAW SUGGEST THAT AFTER CONSIDERATION OF RESPONDENT'S MITIGATING FACTORS IN THIS CASE, INCLUDING RESPONDENT'S LACK OF DISCIPLINARY HISTORY AND NO EVIDENCE THAT RESPONDENT'S CONDUCT CAUSED INJURY, AND THE REMEDIAL MEASURES TAKEN BY RESPONDENT TO CORRECT HIS MISCONDUCT, PROBATION IS THE APPROPRIATE SANCTION IN THIS CASE WHERE RESPONDENT'S FAILURE TO SAFEGUARD CLIENT PROPERTY (IN VIOLATION OF RULE 4-1.15) AND FAILURE TO PROMPTLY REMIT PAYMENT TO CLIENTS OR THIRD PARTIES (IN VIOLATION OF RULES 4-1.15 AND 4-1.3) WAS NOT INTENTIONAL, THAT SUCH MISCONDUCT CAN BE CORRECTED AND RESPONDENT'S RIGHT TO PRACTICE LAW NEEDS TO BE MONITORED RATHER THAN REVOKED.

There being no dispute that Respondent violated Rules 4-1.3 and 4-1.15, this Court's analysis must turn to the appropriate disciplinary sanction for Respondent's misconduct. It is well settled that the fundamental purpose of discipline is not to punish the attorney, but to protect the public and maintain the integrity of the legal profession. *In re Kazanas*,

96 S.W.3d 803, 807-808 (Mo. banc 2003), *In re Wiles*, 107 S.W.3d 228-229 (Mo. banc 2003), *In re Coleman*, 295 S.W.3d 857, 869 (Mo. banc 2009). This Court is often guided by the ABA *Standards* in determining appropriate (*i.e.* direct or indirect) discipline. *In re Coleman*, 295 S.W.3d at 869.

In determining an appropriate penalty for misconduct, the Court considers “the duty violated, the lawyer’s mental state, the actual or potential injury caused by the lawyer’s conduct, and the existence of aggravating or mitigating factors.” See, ABA *Standards*, Rule 3.0, see also, *In re Wiles*, 107 S.W.3d at 229 (the Court considers the gravity of the attorney’s misconduct, as well as any mitigating or aggravating factors that tend to shed light on the attorney’s moral and intellectual fitness as an attorney).

The ABA *Standards* “assume that the most important ethical duties are those obligations which a lawyer owes to clients.” ABA *Standards*, p.5 – 6, *In re Ehler*, 319 S.W.3d 442, 451 (Mo. banc 2010). Those duties include, *inter alia*, diligence (Rule 4-1.3) and safekeeping of client property (Rule 4-1.15). Respondent’s misconduct in this case all arise from ethical obligations owed to clients. Respondent’s ethical violations can be summarized as follows: (a) Respondent deposited earned fees into his Trust Account, thereby commingling funds; (b) Respondent paid personal expenses out of his Trust Account; (c) Respondent failed to promptly reconcile his Trust Account each time a statement became available resulting in his Trust Account balance repeatedly falling below the amount of client funds that should have been retained in the account; (d) Respondent repeatedly failed to promptly pay client funds to his clients or to third parties to whom the

funds were due; and, (e) Respondent failed to maintain complete and accurate Trust Account records.

Having determining the duty violated, the next factor to be examined is the lawyer's mental state. The ABA *Standards* categorize three mental states: intent, knowledge, and negligence. *In re Coleman*, 295 S.W.3d at 869. Intent is the most culpable mental state. *Id.* at 870, ABA *Standards*, p. 6. A lawyer is deemed to possess this level of culpability when he "acts with the conscious objective or purpose to accomplish a particular result." *Id.* (quoting ABA *Standards*, p. 6). Knowledge is displayed when the "lawyer acted with conscious awareness of the nature or attendant circumstances of his or her conduct both without the conscious objective or purpose to accomplish a particular intent." *Id.* Negligence, the least culpable mental state, is exhibited when "a lawyer fails to be aware of a substantial risk that circumstances exist or that a result will follow, which failure is a deviation from the standard of care that a reasonable lawyer would exercise in a situation." *Id.*

Respondent's mental state in this case is "knowledge". Respondent admitted that he was not reconciling his Trust Account on a monthly basis, not keeping detailed client ledgers and that he was withdrawing his fees from his Trust Account using "ballpark" figures that he kept in his "head". Respondent should have recognized that his poor accounting practices could potentially result in his Trust Account balance falling below the necessary amount of client funds that should have been retained in the Trust Account. There was, however, no evidence that Respondent acted with intent to covert such funds. While some payments due Respondent's clients or third parties were delayed for periods

of up to several months, Respondent worked together with the OCDC auditor to ensure that all clients and third parties were paid by the conclusion of the audit period.

The next level of consideration, when determining the appropriate discipline, is whether the client, public or profession sustained an actual injury or potential injury. *Id.* The ABA *Standards* considers the following levels of injury: “serious injury;” “injury;” and “little or no injury.” ABA *Standards*, p. 6, *In re Coleman*, 295 S.W.3d at 870. Here, there was “little or no injury” to Respondent’s clients, the public or profession. Throughout the audit period, Respondent promptly satisfied outstanding payments owed to clients or third parties upon notice by OCDC. Further, notwithstanding the delays in payments (as noted above), OCDC received no complaints from Respondent’s clients or third parties during the audit period.

The final inquiry in determining the appropriate sanction for lawyer misconduct is the existence of aggravating or mitigating factors. The ABA *Standards* provide a theoretical framework to guide the courts in determining the appropriate sanctions. ABA *Standards*, p. 6. The ABA *Standards* recommend that courts take into consideration the existence of aggravating or mitigating factors thereby allowing courts flexibility to impose the appropriate sanction in each case of lawyer misconduct. *Id.* Further, when multiple acts of misconduct are found, “the ultimate sanction imposed should at least be consistent with the sanction for the most serious instance of misconduct among the violations.” *In re Coleman*, 295 S.W.3d at 870 (quoting ABA *Standards*, p.6).

Being guided by the analysis recommended by ABA *Standards*, this Court should find that ABA Standard 4.12 is the most appropriate sanction for Respondent’s failure to

preserve client property and lack of diligence in remitting payment to clients and third parties. ABA Standard 4.12 provides that “[s]uspension is generally appropriate when a lawyer knows or should know that he is dealing improperly with client property and causes injury or potential injury to a client.” *ABA Standards*, 4.12. Here, at a minimum, Respondent should have known the potential and actual risk to draw against client funds by failing to maintain complete and detailed client ledgers and failing to reasonably promptly reconcile his Trust Account. Furthermore, although there was no evidence of any permanent injury or harm to a client, monies due some of Respondent’s clients and third parties were delayed for periods of up to several months due to Respondent’s mishandling of his Trust Account.

The *ABA Standards*, as noted above, permit the courts flexibility to tailor the appropriate sanction in each case of lawyer misconduct by considering mitigating and aggravating circumstances. *ABA Standards*, p.6. The aggravating factors in Respondent’s case, as recognized by the *ABA Standards*, include Respondent’s multiple violations and pattern of misconduct of commingling client funds with personal funds and Respondent’s substantial experience in the practice of law. *ABA Standards*, 9.22(c), (d), and (i). Respondent’s mitigating factors include his lack of disciplinary history, dishonest or selfish motive, his cooperation with the disciplinary proceedings, and the absence of any effort on his part to delay or obstruct the proceedings. *ABA Standards*, 9.32(a), (b), and (e).

After consideration of the aggravating and mitigation factors, the *ABA Standards* provide that a lesser level of discipline is permitted where the misconduct was not intentional. *In re Coleman*, 295 S.W.3d at 870. The *ABA Standards* recommend probation

as the appropriate level of discipline “when the conduct can be corrected and the attorney’s right to practice law needs to be monitored rather than revoked.” *Id.* at 871, ABA *Standards*, Standard 2.7 Probation, Commentary.

In *In re Coleman*, this Court found that probation was the appropriate sanction, in spite of Coleman’s significance disciplinary history, where Coleman’s conduct arose out of “ignorance of the rules of professional conduct instead of an intention to violate the rules,” and that it was likely that Coleman’s “misconduct could be remedied by education and supervision.” *Id.* at 871. The Court noted that Coleman had been previously admonished in 1990 for violations involving communication and unreasonable fees. *Id.* at 859. Later, in 1999, he was admonished again for diligence and communication violations. *Id.* Finally, in 2008, the Court publically reprimanded him for “violations regarding diligence, unreasonable fees and conduct prejudicial to the administration of justice.” *Id.* Although this Court found that Coleman violated several rules, including Rule 4-1.15 (c) by commingling his own funds with client funds in his trust account and by failing to keep adequate accounting records, it concluded that Coleman’s practice of law “need[ed] to be monitored or limited rather than revoked.”

The *Coleman* decision supports the use of probation for Respondent in this case with regard to his violations of the safekeeping property rule. First, there was no evidence that Respondent possessed an intention to knowingly disregard his fiduciary duties and violate the rules of professional responsibility. **App. Vol. 1, A104.** As in *Coleman*, Respondent’s misconduct appeared to originate from lack of appreciation for his ethical obligations regarding his Trust Account fiduciary responsibilities. **App. Vol. 1, A95.**

There was no evidence that Respondent possessed the intent to covert his clients' funds nor was there any evidence of injury to Respondent's clients. **App. Vol. 1, A65, A89-A90.** The OCDC auditor testified that Respondent promptly paid outstanding obligations throughout the audit period upon notice from OCDC that an obligation remained unsatisfied. **App. Vol. 1, A65.** By the conclusion of the audit period, Respondent had worked with the OCDC auditor to ensure that all monies due clients and third parties had been paid. **Id.**

Secondly, despite Coleman's substantial disciplinary history, the Coleman Court found that Coleman's misconduct nevertheless justified probation. Here, Respondent has no prior disciplinary history. Respondent has practiced for more than twenty-five (25) years without any history of discipline. Further, Respondent testified to a number of remedial and corrective measures taken to educate himself about his Trust Account fiduciary responsibilities and ensure compliance with the Rules of Professional Conduct. Respondent testified that he opened a new trust account with Bank of America that is now reconciled on a monthly basis. **App. Vol. 1, A100, A106.** He converted his banking system to an online system and has recently taken a webinar on trust account rules. **App. Vol. 1, A100, A111.** Respondent has additionally implemented a case management program for his practice. **App. Vol. 1, A109.** The remedial measures taken by Respondent thus far of his own accord will aid in protecting the public and maintaining the integrity of the profession while Respondent continues to represent his clients. Just as this Court found in *Coleman*, Respondent's conduct here can be corrected and his law practice "needs to be

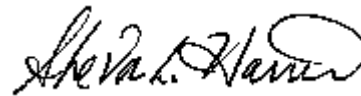
monitored ... rather than revoked.” *Id.* at 87 (*citing* Section 2.7 of the ABA *Standards* Probation, Commentary).

CONCLUSION

On the basis of its analysis of the facts and the guidance provided by the ABA *Standards*, the Panel recommended that Respondent's license be suspended indefinitely with no leave to apply for reinstatement for twelve (12) months, with such suspension to be stayed during a twenty-four (24) month probationary period. Informant concurs in the Panel's recommendation. The sanction of a stayed suspension allows Respondent to continue to represent his clients while being educated on Respondent's fiduciary responsibilities under Rule 4-1.15 and law practice management during the two-year probation period, while addressing the concerns of protecting the public and preserving the integrity of the legal profession. See, *In re Wiles*, 107 S.W.3d at 228-229 ("The purpose of attorney discipline is to protect the public and maintain the integrity of the legal profession.").

Respectfully submitted,

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Chief Disciplinary Counsel



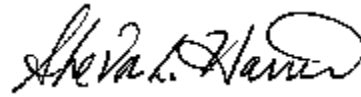
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CERTIFICATE OF SERVICE

I hereby certify that on this 24th day of June, 2015, the Informant's Brief was sent through the Missouri Supreme Court e-filing system to:

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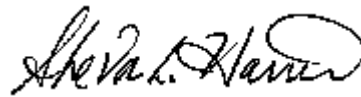


Shevon L. Harris

CERTIFICATION: RULE 84.06(c)

I certify to the best of my knowledge, information and belief, that this brief:

1. Includes the information required by Rule 55.03;
2. Complies with the limitations contained in Rule 84.06(b);
3. Contains 10,058 words, according to Microsoft Word, which is the word processing system used to prepare this brief.



Shevon L. Harris